APPENDIX A

Chapter 12, Acts 1933, Section 40-501 to 40-514 Burns Indiana Statutes 1933

40-501. Issuance of injunctions restricted.—No court of the state of Indiana, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act.

40-502. In the interpretation of this act and in determining the jurisdiction and authority of the courts of the state, as such jurisdiction and authority are herein defined and limited, the public policy of the state is hereby declared as follows:

Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definition of, and limitations upon, the jurisdiction and authority of the courts of the state of Indiana are hereby enacted.

40-503. Agreements and undertakings not enforceable. Any undertaking or promise, such as is described in this

section, or any other undertaking or promise in conflict with the public policy declared in section two (40-502) of this act, is hereby declared to be contrary to the public policy of the state of Indiana, shall not be enforceable in any court of the state of Indiana and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following: Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

40-504. Injunctions and restraining orders—When not issued. No court of the state of Indiana shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section three (40-503) of this act;

(c) Paying or giving to, or withholding from any person participating or interested in such labor dispute, or any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the state of Indiana;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section three (40-503) of this act.

40-505. Combination or conspiracy—When injunction not issued for. No court of the state of Indiana shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitutes or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section four (40-504) of this act.

40-506. Acts of officers and agents of associations—Liability for.—No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the state of Indiana for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

40-507. Injunctions—Testimony and basis for issuing—Temporary restraining order—Bond.—No court of the

state of Indiana shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect;

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; and

(d) That complainant has no adequate remedy at law;

(e) That the public officer charged with the duty to protect complainant's property are (is) unable or unwilling to furnish adequate protection. Such hearings shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officers of the county and city within which the unlawful acts have been threatened or committed charged with duty to protect complainant's property; Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restrain-

ing order shall be effective for no longer than five (5) days and shall become void at the expiration of said five (5) days. No temporary restraining order or temporary injunction shall be issued except on conditions that complainant shall first file an under-taking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable cost (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceedings and subsequently denied by the court. The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which the decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

40-508. Injunctive relief—When denied.—No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

40-509. Injunction—Finding of facts—Limitation on prohibition.—No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of finding of facts made and filed by the court in the records of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall

include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

40-510. Review by Appellate Court.—Whenever any court of the state of Indiana shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for cost, forthwith certify as in ordinary cases the record of the case to the Appellate Court for its review. Upon the filing of such records in the Appellate Court, the appeal shall be heard and the temporary injunction order affirmed, modified, or set aside with the greatest possible expedition giving the proceedings precedence over all other matters except older matters of the same character.

40-511. Contempts of court.—In all cases arising under this act in which a person shall be charged with contempt in a court of the state of Indiana (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and county wherein the contempt shall have been committed; Provided, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

40-512. Contempt proceedings—Change of judge.—The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided

by law. The demand shall be filed prior to the hearing in the contempt proceeding.

40-513. Definitions of terms.—When used in this act, and for the purpose of this act:

(a) A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one (1) or more employers or association of employers and one (1) or more employees or association of employees; (2) between one (1) or more employers or association of employers and one (1) or more employer or association of employers; or (3) between one (1) or more employees or association of employees and one (1) or more employees or association of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the state of Indiana" means any court of the state of Indiana whose jurisdiction has been or

may be conferred or defined or limited by act of the general assembly of the state of Indiana.

40-514. Provisions severable.—If any provision of this act or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the act and the application of such provisions to other persons or circumstances shall not be effected (affected) thereby.

APPENDIX B

First Opinion re: *Roth* v. *Local Union, etc.,* decided Dec. 22, 1939), 216 Ind. 363; 24 N. E. (2d) 280.

Omitting Caption

This is an appeal from an interlocutory order granting a temporary injunction on the application of appellant, who was plaintiff below. The court found the facts specially and stated conclusions of law. There was no motion for a new trial.

In the facts found it appears that at all the times under inquiry the plaintiff owned and operated a small retail grocery, fruit, and vegetable store in the city of Hammond and that he had three employees; that the defendant Local Union No. 1460 of Retail Clerks Union coerced said employees into joining its organization, by threatening them that if they did not do so the store would be picketed and that they would lose their jobs; that thereafter the union requested said employees to go on strike and threatened them with fines if they refused; that the employees refused to strike and resigned from the union; that thereupon the union began to picket the plaintiff's store, by causing one of its agents to continuously walk to and fro on the sidewalk in front of said store, wearing a sign which read:

> "This store is unfair to Retail Clerks Union Local No. 1460, affiliated with American Federation of Labor;"

that there was no strike in the store; that plaintiff was at peace with his employees; that none of them belonged or wanted to belong to said union; and that "the object of the picketing (was) to compel the store owner, against his desire, to sign a closed shop contract with the union whereby the employees would be compelled to join the union, against their will, or be discharged."

The finding recited that the sign carried by said pickets was of the type commonly used by striking employees and

was designed to convey to the public and to the plaintiff's customers the idea that the plaintiff refused employment to, and discriminated against members of said union, which implication was false and operated as a fraud upon the plaintiff, his employees, and the public; that the plaintiff had been harassed and annoyed by said picketing and that a disturbing and notorious situation had been created in front of his store, which interfered with and diminished his business; and that irreparable injury had been inflicted upon the plaintiff which was incapable of accurate computation, and for which there was no adequate remedy at law, all of which would continue indefinitely unless restrained by the court. The court further found that the plaintiff had performed all obligations imposed upon him by law; that the public officers charged with the duty of protecting plaintiff's property were unable or unwilling to furnish adequate protection; and that the picketing of plaintiff's store had been peaceful and free from violence of any kind.

Upon the above facts, the court stated the following conclusions of law: (1) that the case involved a labor dispute within the terms of Ch. 12, Acts of 1933, commonly known as the Anti-Injunction Act; (2) that the court had jurisdiction to issue and should issue a temporary injunction enjoining the acts complained of, subject to the provisions contained in the third conclusion; and (3) that the court should on its own motion authorize defendants to do a modified type of picketing, and that failing so to do they should be enjoined.

The temporary injunction followed the conclusions of law and enjoined the defendants from coercing or attempting to coerce plaintiff to sign a closed shop contract; from coercing or attempting to coerce plaintiff to compel his employees to become members in the defendant union; and from coercing or attempting to coerce plaintiff's employees to become members of said union. They were also enjoined from in any manner intimidating or warning customers or persons doing business with plaintiff to stay away from his store. The defendants were authorized, however, to picket the plaintiff's store by causing one agent at a time to walk

in front of said store and carry a sign with letters 1½ inches high, clearly legible, bearing the following text:

> "The object of this picketing is to compel the store owner to sign a closed shop contract with Retail Clerk's Union Local No. 1460, A. F. of L.
>
> "His clerks are not on strike, do not wish to join the union and are satisfied with wages, hours and working conditions."

Except as above authorized, all picketing was enjoined, and, upon failure of the union to exercise the privilege granted within 15 days from the date of the order, the temporary injunction was made unconditional.

By proper assignments of error and cross-errors, the correctness of each of the trial court's conclusions of law and that part of the temporary injunction undertaking to prescribe a form of permissible picketing is challenged.

Prior to the enactment of any statute upon the subject in this state, this court recognized, under the principles of the common law, the right to picket in controversies between an employer and his employees, where there was no resort to force, threats, intimidation, or other unlawful means. *Karges Furniture Co.* v. *Amalgamated, etc. Union* (1905), 165 Ind. 421, 75 N. E. 877, 2 L.R.A. (N.S.) 788, 6 Ann. Cas. 829. This right, when lawfully used, has been declared to be a proper exercise of free speech and peaceable assemblage and the right to use the public streets and highways. It has also been held that when such picketing is accompanied by force, intimidation, or coercion it becomes unlawful and will be enjoined by the court in the exercise of its equitable powers. *Thomas* v. *Indianapolis* (1924), 195 Ind. 440, 145 N. E. 550, 35 A.L.R. 1194. Picketing becomes unlawful when either the object thereof or the means used is unlawful. Thus picketing for an unlawful purpose will taint and render unlawful acts done in furtherance thereof which would have been lawful if done for a legitimate purpose; and, conversely, a lawful objective will not justify the employment of means which are themselves unlawful. *Local 26, Natl. Bro. of Op. Potters* v. *City of Kokomo* (1937),

211 Ind. 72, 83, 5 N.E. (2d) 624; *McKay* v. *Retail Automobile Salesman's Local Union No. 1067* (1939), ——— Cal. App. ———, 89 P. (2d) 426, 90 P. (2d) 113.

In 1933 the General Assembly passed what is commonly known as our Anti-Injunction Act. Acts 1933, Ch. 12, §§ 40-501 to 40-514 Burns' 1933. The broad purposes of the act, as gathered from its terms, appear to be to declare the public policy of this state with respect to controversies between employers and their employees and to place limitations upon the jurisdiction of courts to grant injunctions in such cases. Appellant has questioned the validity of the sections of the act relating to the last-mentioned objective, upon the theory that they are unconstitutional encroachments by the legislative branch of the government upon the powers of the judiciary. We think the present controversy may be determined without resort to a consideration of that subject. Courts will not pass upon a constitutional question or decide whether a statute is invalid, unless such decision is absolutely necessary to a disposition of the cause on its merits. *State* v. *Darlington* (1899), 153 Ind. 1, 53 N. E. 925; *Hewitt* v. *State* (1908), 171 Ind. 283, 86 N. E. 63.

We can not, however, ignore the declarations of public policy contained in the above-mentioned act. These are directly expressed in specific terms. They are as follows:

> "In the interpretation of this act and in determining the jurisdiction and authority of the courts of the state, * * * the public policy is hereby declared as follows:
>
> "* * * the individual unorganized worker * * * should be free to decline to associate with his fellows, * * * have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and * * * *that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* * * *." (Our italics.) Acts 1933, Ch. 12, §2, §40-502 Burns' 1933.

To ascertain the intent of the legislative body that enacted a statute is the fundamental rule for its judicial construction. When the purpose of an act is expressed in clear and unambiguous terms, this must be accepted as the solemn declaration of the sovereign. The public policy of the state is a matter for the determination of the Legislature and not for the courts. The statute here under consideration declares that it is the public policy of this state that the individual unorganized worker shall be free to decline to associate with his fellows and that he shall be free from interference, restraint, or coercion on the part of his employer. This must mean *that no labor union may demand that an employer require his employee to join such union*, because no employer has the right to require an employee to join or refrain from joining a labor union. *Any person or group which undertakes to coerce an employer to do that which is contrary* to the express public policy of this state thereby undertakes to compel the performance of an unlawful act. The lawful weapon of peaceful picketing may not be utilized to accomplish such an unlawful purpose. It is quite immaterial that the things done to bring about the unlawful purposes were not *per se* unlawful. This is our interpretation of our statute.

In *McKay* v. *Retail Automobile Salesman's Local Union No. 1067*, supra, the District Court of Appeal for the First District of California, considered a statute substantially like ours and reached the same conclusion. After exhaustively reviewing the cases and discussing the principles involved, the course said:

> "When acting thus under the statute any 'individual workman' or group of individual workmen has the right to bargain with his employer 'free from the interference, restraint, or coercion' of the employer, directly or indirectly. The statute having fixed the duty of the employer in such matters, no 'individual workman' and no group of employees or others may force the employer to breach that duty by picket, boycott, secondary boycott, or any other means. The privilege of 'freedom of association, self-organization, and designation of representatives of his own choosing' is the meat of the

declared state policy, and this is a substantial right which may be protected by injunction. To this end the State has declared that it is for the greatest benefit of the employer and the employee, and the general public at large, that controversies over conditions of employment should be settled by negotiation, arbitration, and conciliation, rather than by force or intimidation on the part of either employer or employee. We should add that we are not expressing herein our own philosophy in relation to the many controversies arising between employers and employees, nor to those arising between certain groups of employee organizations. We are merely stating the policy the legislature has adopted as the law controlling such relations."

In this connection, see also: *Fornili* v. *Auto Mechanics Union, etc.* (1939, ——— Wash. ———, 93 P. (2d) 422; *Swing* v. *American Federation of Labor et al.* (1939), ——— Ill. ———, 22 N. E. (2d) 857; *Meadowmoor Dairies, Inc.* v. *Milk Wagon Drivers Union* (1939), 371 Ill. 377, 21 N. E. (2d) 308.

The facts are not here in dispute. The court found from the evidence (which is not before us) that the plaintiff had performed all obligations imposed upon him by law; that he was at peace with his employees; that none of them belonged or wanted to belong to the picketing union; *and that the object of the picketing complained of was to compel the plaintiff, against his desire, to sign a closed shop contract, whereby his employees would be compelled to join the union against their will or be discharged, which, as we have already pointed out, the plaintiff was prohibited from doing by positive law. Under these circumstances, the picketing was wrongful and oppressive and it ought to have been enjoined.*

The trial court's attempt to substitute a form of picketing which it thought would be proper can not be justified for several reasons. The picketing of plaintiff's place of business for the purposes for which it was done would not have been made proper by the use of the sign suggested by the court; the relief granted was without the scope of the issues;

and, *if* picketing had been proper, it could not have been the function of the court to prescribe the form, context, and character of the sign that might be displayed. The privilege of free speech carries with it freedom of choice as to the mode of expression that may be employed.

Reversed, with directions to the trial court to restate its conclusions of law in harmony with this opinion, and to modify the temporary injunction accordingly.

APPENDIX C

Second Opinion: *Local Union etc.* v. *Roth* decided Feb. 24, 1941 218 Ind. 275, 31 N. E. (2d) 986.

Omitting Caption

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

Fansler, J.

Richman, J., not participating

This is an appeal from the final judgment enjoining the appellants from picketing the premises of the appellee. The case was here before on an appeal from an interlocutory order granting a temporary injunction. (See *Roth* v. *Local Union No. 1460 of Retail Clerks Union et al.* (1939), 216 Ind. 363, 24 N. E. 2d 280.)

On the trial of the application for a temporary injunction, the court found the facts specially. Upon the appeal the evidence was not brought before us, and the cause was decided upon the basis of the facts disclosed by the special findings. From the facts shown, it was concluded by this court that the three clerks who worked for Roth in his store were not members of the picketing union at the time the picketing began and at the time demands were made upon him to sign a closed shop agreement; that he had not interfered with the freedom of his employees to join or not to join the union; that he was refusing to interfere or to sign a contract, by the terms of which he agreed to require his clerks to join the union, upon the ground that to do so would require him to violate the expressed statutory public policy of the state (Acts 1933, ch. 12, Sec. 2, p. 28, Burns' Ind. St. 1933, Sec. 40-502, Baldwin's Ind. St. 1934, Sec. 10156), which declares that employees "shall be free from interference, restraint, or coercion of employers"; that the purpose of the picketing was to coerce him to violate this declared public policy under penalty of having his business destroyed by the picketing.

Upon the present appeal, the evidence is brought into the record.

The sufficiency of the evidence to sustain the special findings is challenged, and it is asserted by the appellants that there is no evidence to sustain the finding that the signs carried by the pickets "are designed to convey to the public and plaintiff's customers the idea that plaintiff refuses employment to, or discriminates against members of defendants' union, which idea implies representations which are false and in fact operate as a fraud upon plaintiff, his employees and the public." This assertion directed attention to the evidence.

The appellee, as plaintiff below, called as a witness one of his clerks, Dorothy Carlson. She testified that she went to work for Roth, when he opened his store in January, 1939, as a grocery clerk; that she joined the defendant union in March, 1939; that, before joining, a representative of the union talked to her, and told her that if she refused to join pickets would be put in front of the store, and that she would be out of a job if that was done; that because of this threat she joined the union. She was still a member of the union on the morning of *May 17, 1939*. On that morning she came to work about 8 o'clock. Shortly after 8 o'clock a representative of the union came to her and told her to go out and picket. She told him that she would not, and he told her it would cost her a $50 fine. Shortly thereafter, at about 8:30 o'clock on the same morning, the picket line was established. The witness did not leave the store until about 11:30 o'clock, when she went out to lunch. She came back at approximately 12:30 o'clock. The picket line was still operating. At about 2:30 o'clock in the afternoon, Roth handed his clerks a letter and told them to read it. This letter was typed, ready for signature, and reads as follows:

"Hammond, Indiana, May 17, 1939

"Retail Clerks Union, Retail Clerks International Protective Association,

"Gentlemen:—

"The undersigned hereby resigns from your association and severs all connection with your association and all of your agents, effective immediately. You and all of your agents are forbidden to represent the undersigned in any manner."

She read this letter and signed it. The other two clerks, Wellington A. Barnes and Meyer Kaplan, signed it before her. After she signed it, she gave it back to Roth. On cross-examination, she was asked:

"Q. Had you any intention of resigning from the local union prior to the time you were handed this document? A. Why, I didn't want to belong in the first place.

"Q. Had you any intention of resigning from the local union prior to the time you were handed this document? A. If possible, I would have.

"Q. What do you mean by 'if possible?' A. Well, I could figure no way to get out of the union without having them raise a lot of trouble in the store.

"Q. I see. Did you take it to mean, when Mr. Roth handed you this letter, that he wanted you to sign it? A. Why, I understood that, yes.

"Q. Did you have any information that this letter existed prior to the time Mr. Roth handed it to you?"

There was an objection the question, and, when it appeared that it might be sustained, the question was withdrawn. She was then asked:

"Q. Had you ever talked to Mr. Roth about this letter before you signed it? A. No, I did not.

"Q. Had you ever talked to Mr. Roth about the possibility of resigning from the union before you signed this letter?"

There was an objection to this question, which was not answered. Then the court said:

"Well, I will ask the young woman. In fact, I presume you are not a typist. Do you use a typewriter? A. No, sir.

"The Court: You did not type this letter yourself, personally?

A. No, sir.

"The Court: She said she did not write the letter."

She was then asked:

"Q. Was this document typed at your direction?"

There was an objection, and, after some discussion the question was withdrawn.

In the discussion of counsel concerning objections to these various questions, counsel for the defendants said: "We should like to know if she had any information about it beforehand." The court inquired: "Why? What is the materiality of that"? And the defendants' counsel replied: "For the reason, if the court please, it may be this thing was talked over prior to the time this lady signed." Counsel for the plaintiff said: "Of course it was talked over." Defendants' counsel said: "If it was, I would like to know what the conversation was."

The rulings on the objections to these questions are not assigned as error. They are referred to show that the examination of this employee, seeking to disclose the origin of the letter of resignation from the union, and by whom it was inspired, was unduly curtailed. The witness was brought forward by the plaintiff, Roth, who did not take the stand and deny any of her testimony. The other two clerks were not called as witnesses.

After the letter was signed and delivered to Roth, it was mailed to: "Retail Clerks Union, Retail Clerks International Protective Assn., Indiana Hotel Bldg., Hammond, Ind."

by registered mail. The envelope bore the following names and return address on the upper lefthand corner: "W. A. Barnes, Meyer Kaplan, Dorothy Carlson, 5823 Calumet Ave., Hammond, Ind."

It is clear from this undisputed evidence that at the time the union demanded that Roth sign a closed shop contract, and at the time the picketing began, all of Roth's clerks were members of the picketing union, and continued to be members for at least several hours thereafter; that Dorothy Carlson, and, it may be inferred, the other two clerks, never saw the letter of resignation until it was handed to them by Roth; that she at least, and probably the other two, had not planned to resign until presented with the document. When it is considered that the signers of the letter were grocery

clerks in a small grocery, the language of the letter and its construction clearly indicate that it must have been prepared by some one else. It clearly indicates that Roth's employees were not "free from interference," as the public policy statute upon which he relies requires that they should be. Nor can it be confidently said that they were free from coercion. They understood that Roth wanted them to sign the letter. A request sometimes has the force of a command. Failure to comply with an employer's request may mean loss of employment. This undoubtedly is the reason for the statutory provision that employees shall be free from interference in matters affecting their joining or refusing to join labor organizations.

These facts establish a case differing substantially and materially from the one disclosed by the special findings. From the special findings it appears to be a case in which a labor union seeks, by picketing, to coerce an employer to require his employees who are not members of the union to join the union upon penalty of being discharged. But it is not such a case. At the time the picketing began its purpose was to coerce an employer, all of whose employees were members of the picketing union, to agree that in the future he would employ only union members. The right to an injunction under such circumstances was denied in *Scofes et al* v. *Helmar et al.* (1933), 205 Ind. 596, 187 N. E. 662.

By the time the case was tried the situation had changed. The employer had interfered and aided and encouraged his employees to sever their connection with the union. This conduct is a violation of the very public policy statute which the appellee relies upon as entitling him to an injunction. He says in substance: "Being a law-abiding citizen, I refuse to interfere or coerce my employees to join a union to which they do not belong. The law forbids that I do so. Therefore it is unlawful for this union to seek to coerce me to violate the law by picketing me as unfair to union labor. It would be unfair for me to interfere or coerce my employees." But the fact is that he has not been law-abiding with respect to the statute. He has interfered and intermeddled; he has encouraged, if not coerced, his employees, which conduct is a violation of the statute upon which he relies for protection

against picketing. Under the public policy declared by that statute, he has been unfair, and the banner carried by the picket speaks the truth. He may not insist that the appellants be required to conform to a public policy to which he, himself, refuses to conform.

Appellants' objection to the special findings was sufficient to direct our attention to the evidence. The objection was vague and did not point specifically to the testimony of Dorothy Carlson, but the true facts being disclosed by our examination of the evidence, we may not ignore them. The appellee was the plaintiff, seeking the aid of a court of equity. He had the burden of establishing facts which entitled him to injunctive relief. The testimony of his own witness discloses that he is not entitled to an injunction. The special findings do not reflect the true situation. They are not supported by the evidence.

Judgment reversed, with instructions to dissolve the injunction and to grant appellants' motion for a new trial.

Richman, J., not participating.

APPENDIX D

Third Appeal

OPINION AND JUDGMENT DECIDED BY THE INDIANA SUPREME COURT ON THE 5th DAY OF MARCH, 1942.

Local No. 1460 of Retail Clerks Union, Retail Clerks International Protective Assn., Thomas Day and Vernon Housewright, Appellants v. *Aaron Roth*, Appellee ——— Ind. ———, 39 N. E. (2d) 775.

The general character of this controversy may be learned from the opinions in the two former appeals, *Roth* v. *Local Union No. 1460 of Retail Clerks Union* (December 22, 1939, 216 Ind. 363, 24 N. E. (2d) 280, and *Local No. 1460 of Retail Clerks Union* v. *Roth* (February 24, 1941), 218 Ind. 275, 31 N. E. (2d) 986. In the first appeal we ordered modified an interlocutory order granting temporary injunction. In the second we reversed a final decree granting a permanent injunction and ordered a new trial which has since been had with special finding of facts and conclusions of law on which again a final decree was entered granting a permanent injunction from which this third appeal is taken.

If the facts now are substantially the same as in the second appeal we need not restate the applicable law for the second opinion will remain the law of the case. 5 C.J.S. Appeal & Error Sec. 1821, p. 1267.

The factual basis for the opinion is epitomized in the sentence: "The employer had interfered and aided and encouraged his employees to sever their connection with the union." (218 Ind. at p. 281)

Now it is claimed that they had ceased to be members a few hours prior to his interference. This claim is predicated on the statement of the union's agent to two of the clerks that if they did not strike it would cost them $50 to get back in the union. They testified that they understood therefrom that they were no longer members and therefore regarded the signing and mailing of the letter of resignation as merely a formal notification of a prior severance of their rela-

tions with the union. Hence appellee asserts he was guiltless of interference with that relationship.

We doubt the authority of an agent of the union to expel its members in such a casual manner. We doubt also the power of a member to repudiate his status by a mental process of which the union is not informed. But assuming that the clerks thought that they were no longer members, it does not appear that any such thought was in the mind of the employer when he handed them the letter addressed to the union informing it that the three clerks thereby resigned. Persons do not resign from an organization with which they are not connected. The letter assumes the present existence of a relationship which it proposes to dissolve.

In the former opinion we commented upon the fact that none of the clerks knew about the letter until it was handed them ready for their signatures and that its source was a mystery. In the retrial appellee had the opportunity of producing evidence to rebut any erroneous inference we may have drawn from the facts and from his unexplained connection with the letter. But he did not choose to testify. Nor was his conduct in anywise explained. There is no change in the evidence as to what he did. Miss Carlson changed her testimony as to what she thought when he handed her the letter. But her thoughts do not characterize his action. While there may be some doubt from the evidence that she or the other clerks were in fact coerced, there is no escape from the conclusion that their employer interfered and aided and encouraged his employees to sever a connection with the union which he thought existed, and this at the time of the picketing which he sought to enjoin. We think the facts are substantially the same as related in the second opinion which therefore is the law of the case.

The decree is reversed with instructions to set it aside, restate conclusions of law in harmony with this opinion and enter a decree that appellee take nothing and appellant recover its costs.